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In The
Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF OF AMBASSADOR DAVID J. SCHEFFER, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

AMBASSADOR DAVID J. SCHEFFER
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611-3069
(312) 503-2224
d-scheffer@law.northwestern.edu
Amicus Curiae
June 13, 2012

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF THE *AMICUS CURIAE*[1]

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, where he teaches international criminal law and international human rights law. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and senior adviser and counsel to the U.S. Permanent Representative to the United Nations (1993-1997). He was deeply engaged in the policy formulation, negotiations, and drafting of the constitutional documents governing the International Criminal Court. Ambassador Scheffer led the U.S. delegation that negotiated the Rome Statute (Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter "Rome Statute"]), and its supplemental documents from 1997 to 2001. He was deputy head of the delegation from 1995 to 1997.

On behalf of the U.S. Government, Ambassador Scheffer negotiated the statutes of and coordinated support for the International Criminal Tribunals for the former Yugoslavia and Rwanda, Special Court for Sierra Leone, and Extraordinary Chambers in the

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[1] All counsel have consented to the filing of this brief through a blanket consent filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

Courts of Cambodia (the "war crimes tribunals"). He has written extensively about the tribunals, including the International Criminal Court, and the negotiations leading to their creation. He also is the U.N. Secretary-General's Special Expert on United Nations Assistance to the Khmer Rouge Trials, but the views expressed herein are strictly his own and are not attributable in any way to the United Nations.

Ambassador Scheffer, who is a member of the Supreme Court Bar, submits this brief as supplemental to his *amicus curiae* brief of December 20, 2011, on the merits in this case (Br. of Ambassador David J. Scheffer, Northwestern University School of Law, as *Amicus Curiae* in Supp. of the Pet'rs, Dec. 20, 2011 [hereinafter the "December brief"]) for three reasons related to the question presented for reargument[2] and to the oral argument of February 28, 2012 (Oral Arg. Tr., Feb. 28, 2012 [hereinafter the "oral argument"]): (1) to correct misleading statements about the December brief by counsel for Respondents during the oral argument, Oral Arg. Tr. 34:17-35:3, 42:7-8, 49:2-6, 50:10-18, (2) to report certain facts about both corporate liability for crimes and the extraterritorial enforcement of law by nations that

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[2] The question presented for reargument is: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." Order in Pending Case, Mar. 5, 2012.

have ratified the Rome Statute, in contrast to misleading views expressed by Respondents, and (3) to confirm the customary international law rule on mens rea for aiding and abetting, a key mode of corporate participation in egregious torts, such as genocide, crimes against humanity, and serious war crimes ("atrocity crimes"), *see* DAVID J. SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 428-37 (2012), that has been erroneously described by Respondents in their effort to eviscerate corporate liability under the Alien Tort Statute, 28 U.S.C. § 1350 (hereinafter the "ATS").

SUMMARY OF ARGUMENT

This *amicus* brief addresses the following primary points:

First, Respondents have made misleading statements about the legislative history of the Rome Statute. I was the chief U.S. negotiator of the Rome Statute. In my December brief, I explained precisely what transpired with corporate liability during the negotiations. The Rome Statute was conceived to govern the jurisdiction of an international criminal court over natural persons and not one committed to civil claims underpinning corporate liability. While there was a very limited discussion in the final stage of the negotiations about civil liability of corporations, it never matured into any meaningful deliberation because time was running out and the core rationale

of the International Criminal Court – individual criminal responsibility – was being overshadowed by the proposal.

Contrary to Respondents' arguments, there was no affirmative decision to deny corporate liability of either a civil or criminal character because of any arguable lack of a rule under international law regarding such corporate liability. Rather, no decision at all resulted other than to abandon the issue as part of the treaty negotiations and re-focus on the long-standing objective of individual criminal liability for natural persons.

My December brief provided ample explanation about why the Rome Statute did not include corporate liability, an accounting ignored by Respondents' counsel during oral argument. When considered, my earlier explanation contradicts the attempt by Respondents to invoke my December brief to support their contention that the ATS should exclude corporate liability. What occurred during the Rome Statute negotiations with corporate liability is irrelevant to that issue under the ATS. Negotiators in Rome were reaching decisions based on different rationales and time pressures and did not perceive their policy decision to exclude corporate liability as an expression of customary international law, contrary to what Respondents would have the Court understand or infer from my December brief.

Second, some nations have ratified the Rome Statute with national implementing legislation that establishes corporate liability under certain conditions

for atrocity crimes also falling within the jurisdiction of the Rome Statute ("Rome Statute crimes"), reaffirming that the policy decision to abandon corporate liability for the purpose of the treaty text offers no guidance today for the status of customary international law. The extension of such liability under national law through extraterritorial application also has occurred. Indeed, the United States has enacted several laws recently that employ extraterritorial jurisdiction for the commission of certain atrocity crimes and egregious human rights abuses by aliens, provided they set foot on U.S. territory. A pragmatic nexus requirement of such similar character long has been applied in federal ATS corporate cases, thus ensuring a safety valve of reasonable U.S. contact for the enforcement of the ATS in relation to corporate conduct.

The European Union has established corporate civil liability for crimes with extraterritorial character under the Brussels I Regulation (Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 5(3), 2001 O.J. (L 12) 1, 4 [hereinafter "Brussels I Regulation"]) even though it remains of a predominantly theoretical character. The European Union has demonstrated an acceptance of a limited form of extraterritorial corporate liability, particularly as it may relate to non-European Union victims and potentially also non-European Union perpetrators.

Third, although not originally before the Court in this case, aiding and abetting liability was raised during oral argument by the Justices and by Respondents'

counsel. Respondents' basic point appears to be that since the ATS would look to international law to determine aiding and abetting, then presumptively the ATS would look to the Rome Statute, which the United States has not ratified, to determine whether corporations can be held liable for Rome Statute crimes before the International Criminal Court.

Courts, however, look to customary international law to determine liability for aiding and abetting because aiding and abetting is a mode of participation and, as such, is directly tied to the substantive tort, or crime, being defined under international law and adjudicated. In contrast, corporate liability under the ATS exists as a remedy, and federal common law governs the question of corporate liability. The Rome Statute is a source for neither the finding of corporate liability nor the determination of corporate aiding and abetting in the commission of atrocity crimes.

Furthermore, contrary to Respondents' representations, the Rome Statute is not necessarily representative of customary international law on the mens rea standard for aiding and abetting. The war crimes tribunals have found that under customary international law, the mens rea standard for aiding and abetting is the knowledge standard, regardless of how one interprets the wording of the Rome Statute.

The fundamental flaw in Respondents' argument is their tactic to eliminate or at least severely restrict corporate liability under the ATS by invoking the

Rome Statute as the bastion of customary international law. Using key provisions of the Rome Statute, and Respondents' interpretation thereof, as a source of law for the ATS is a deeply flawed legal methodology that ignores the distinction between customary international law, as repeatedly affirmed by the war crimes tribunals, and a heavily negotiated treaty document such as the Rome Statute.

Fourth, there are strong policy reasons why the Court should uphold corporate liability and extraterritorial jurisdiction under the ATS. The outcome that best honors the Founders' commitment to authentic values tied to the rule of law would be to affirm that no man, woman, or corporation stands above the law, as that law was confirmed by the Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (hereinafter "*Sosa*"). In recent years, other nations have moved in the same direction that the Founders moved in 1789 with enactment of the ATS. The United States, having paved the road long ago, should remain in the leadership of both individual criminal liability and of corporate liability based on civil claims for the commission of or complicity in atrocity crimes.

To eliminate corporate liability altogether under the ATS or to hold that the ATS has no extraterritorial application whatsoever, for either natural persons or corporations, would reverse gears on the drive towards international justice that has been accelerating during the last two decades.

The Court should resolve the questions before it by ruling that the ATS, in line with federal jurisprudence for decades prior to the Second Circuit's judgment in this case, covers corporations as potential targets of ATS actions. The Court has an opportunity in this case to demonstrate that the United States and its laws continue to inspire the quest for justice that so many other nations have chosen to embrace in recent years despite, and tragically because of, continuing atrocities across the globe.

ARGUMENT

I. Respondents' References to Ambassador Scheffer's December Brief and the Rome Statute of the International Criminal Court Were Misleading Because Negotiators at Rome Did Not "Reach the Merits" of Corporate Civil Liability

During oral argument, Kathleen M. Sullivan, on behalf of Respondents, repeatedly referenced my December brief and its focus on the Rome Statute but ignored my explanations about why the Rome Statute excludes civil and criminal liability for corporations. Each of Ms. Sullivan's statements about the Rome Statute, Oral Arg. Tr. 34:17-35:3, 42:7-8, 49:2-6, 50:10-18, manipulated my factual statement that the Rome Statute does not include corporate liability. She did so in order to support her main argument of denying corporate liability under the ATS and conveniently ignored the reasons set forth in my

December brief for that exclusion. Those reasons thoroughly rebut her argument, which may explain why she ignored them.

Ms. Sullivan first stated: "the Scheffer *amicus* brief in support of Petitioners points out, at page 18, [the negotiators of the Rome Statute] actually also discussed civil liability for corporations, and the nations of the world who created the ICC, one of the most important modern instruments for bringing about human rights prosecutions, declined to embrace . . . jurisdiction over corporations." Oral Arg. Tr. 34:20-25, 35:2-3.

I state in my December brief that "there was only scant attention paid to civil liability for corporations responsible for atrocity crimes." Scheffer Dec. Br. 17-18. The "scant attention" resulted in a discussion that civil liability was outside the realm of our negotiations. We did not "decline to embrace" jurisdiction over juridical persons, Oral Arg. Tr. 34:21-35:3, which goes to the merits of corporate civil liability. Rather, we simply declined to further discuss that sort of jurisdiction within the scope of negotiations at Rome.

This explanation makes Ms. Sullivan's later comment all the more misleading. She stated: "the Rome statute . . . rejected civil liability. That's in the Scheffer brief. . . . So, the Rome statute rejected either [civil] or criminal liability for corporations under the new ICC." Oral Arg. Tr. 50:10-17. That is a disingenuous characterization of what transpired because negotiators never reached the merits of

corporate civil liability – the only liability at issue in the case before this Court.

If the reason we never talked about the merits is not clear from my December brief, some brief historical background should be helpful. For years prior to the conclusion of the Rome Statute on July 17, 1998, international negotiations were focused on the *criminal* liability of *natural* persons, as had been the case with the International Criminal Tribunals for the former Yugoslavia and Rwanda (the "ad hoc tribunals") when they were created in 1993 and 1994, respectively. The U.N. Security Council created the ad hoc tribunals pursuant to its enforcement authority under Chapter VII of the United Nations Charter. The goal each time was to bring the most culpable individual perpetrators to justice for atrocity crimes committed in the relevant territory.

As a key negotiator for the statutes of both of the ad hoc tribunals, I can confirm that there was never any interest in exploring corporate liability in either situation for two reasons. First, corporate liability simply was not the purpose of the ad hoc tribunals; the objective was to bring to justice political and military leaders and, in the case of the International Criminal Tribunal for Rwanda, certain media tycoons responsible for hate radio broadcasts. Second, for better or for worse, the cast of individual suspects was so large for each ad hoc tribunal that all of our attention, as negotiators representing governments, was on the politicians, military officers, and militia leaders who created hell on earth during those years.

There was no particular objection to corporate liability, or any failure to agree on a general principle of international law. Rather, we focused only on individual leaders because that was the objective, and that was more than enough work to keep us busy with the limited U.N. funding that would be available for both tribunals.

Nor was there any serious discussion during negotiations for either ad hoc tribunal of any form of *civil* liability. Following suit, the International Criminal Court from the beginning was designed as, and would be, a criminal court rendering criminal penalties, as had been agreed during the earlier creation of the ad hoc tribunals.

When, however, corporate liability was proposed during the final U.N. negotiations leading to the Rome Statute, it was well known that corporations, so often acting through agents, are held liable for civil damages for the commission of torts in national jurisdictions around the world.[3] The negotiators thus

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[3] "The law of the United States has been uniform since its founding that corporations can be held liable for the torts committed by their agents. This is confirmed in international practice, both in treaties and in legal systems throughout the world. Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for 'shockingly egregious violations of universally recognized principles of international law.' *Zapata v.*

(Continued on following page)

had the opportunity to consider this general principle of law – civil liability for corporate commission of torts – during the Rome Statute negotiations. Again, the reason that that form of liability was not included in the Rome Statute was not, as Ms. Sullivan posits, because there is no rule of international law embracing civil liability for corporate misconduct, but because the Rome Statute was conceived as a treaty establishing a *criminal* court with *criminal* penalties, not a court of *civil* claims. Except for the briefest of discussions, considerations of civil liability were outside the realm of Rome Statute negotiations.

Finally, and perhaps most fundamentally, treaty negotiations typically are not exercises in arriving at affirmative decisions to exclude options from the final treaty text. Affirmative decisions are made to include text in the treaty and not necessarily to exclude any particular proposal or provision. Many drafting proposals are left abandoned in the hallways and in negotiating rooms with polite diplomatic gestures and assurances of good faith consideration. Anyone who suggests, as Ms. Sullivan did in oral argument, that negotiators in Rome made an affirmative decision to deny corporate liability under the Rome Statute because of an explicit determination based on international law, fundamentally fails to understand the

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Quinn, 707 F.2d 691 (2d Cir. 1983)." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011).

dynamics of such negotiations and their relevance to international law.

II. Some Nations That Have Ratified the Rome Statute of the International Criminal Court Include Corporate Liability for Rome Statute Crimes and Extraterritorial Application, Even Though They Are Not Required To Do So

The question posed for reargument is better understood if one examines empirically how nations that have ratified the Rome Statute used the implementation procedures or their existing law to establish corporate civil or criminal liability for egregious torts and crimes. It is also telling to examine where these nations also have done so with extraterritorial application. If Respondents would like to emphasize the importance of the Rome Statute in their analysis of corporate liability – even though I disagree with them for the reasons elaborated above – they should at least grapple with the empirical legislative reality.

At several points during the oral argument and in Respondents' merits brief, very general statements were made about corporate liability for the offenses alleged and the divergence among various national domestic laws. *See* Oral Arg. Tr. 50:22-51:3, 52:2-6; Br. for Resp'ts 9, 22 n.9, Jan. 27, 2012. Respondents would have the Court conclude that such divergence denies any rule of international law for such liability,

which under their interpretation of footnote 20[4] of *Sosa* must then exclude corporations as tortfeasors under the ATS.

If, however, one correctly interprets footnote 20 of *Sosa*,[5] then the exposure of corporations as tortfeasors and the type of liability to which they are subjected under national law is analogous to corporate liability under the ATS. The fact remains that many nations have used either standing national law or the Rome Statute implementation process to extend criminal liability beyond individuals to corporations. Under the law, some of these nations now entertain civil[6]

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[4] Footnote 20 states: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20.

[5] *See* Scheffer Dec. Br. 3-4; David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 364-65 (2011).

[6] For a discussion of civil liability of corporations for crimes in the European Union under the Brussels I Regulation, *see infra* pp. 24-26. Additionally, "[o]ften times, civil damages can be attached to criminal proceedings such as under the concept of *constitution de partie civile* under French and Belgian law." Scheffer & Kaeb, *supra* note 5, at 370-71. For example, France, Belgium, and the Netherlands, countries where corporations are possibly exposed to criminal liability for crimes that include atrocity crimes, have "quasi-criminal and/or administrative penalties that accompany criminal actions and effectively serve as punitive sanctions." *Id.* at 371. Furthermore, corporate civil liability is a general principle of law. *See generally,* International

(Continued on following page)

and/or criminal liability for extraterritorial corporate conduct.

Nations where corporations are potentially exposed to criminal liability (often times joined with civil liability) for atrocity crimes include the following fifteen countries that have ratified the Rome Statute:

France – criminal (*see* CODE PÉNAL [C. PÉN.] arts. 121-2, 213-3 (Fr.))

Belgium – criminal (*see* CODE PÉNAL [C. PÉN.] art. 5 (Belg.))

Spain – criminal (*see* B.O.E. 1995, 31 (Spain))

Australia – criminal (Richard Meeran, *Survey Response, Laws of Australia* 7-10, *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions*, FAFO, 2006; *see Criminal Code Act, 1995* (Cth) pt 2.5, div 12.1 (Austl.); *Id.* at div 268.3; *Id.* at dictionary)

United Kingdom – criminal (Stephen Powles, Rosanna Mesquita, Jeremy Carver & Richard Hermer, *Survey Response, Laws of the United Kingdom* 24-26, *Business and International Crimes*, FAFO, 2004; *see* Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19, § 1(1)(a)-(b) (Eng.); Interpretation Act, 1978, c. 30, § 5, sch. 1 (Eng.); *Id.* at § 22, sch. 2;

Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (2008), *available at* http://www.business-humanrights.org/Updates/Archive/ICJ Paneloncomplicity.

International Criminal Court Act, 2001, c. 17, § 51(1) (Eng.))

Bosnia and Herzegovina – criminal (*see* Criminal Code of Bosnia and Herzegovina [PEN. C.] arts. 10, 13(3), 143, 144(3), 171, O.G. 3/03, 32/03, 37/03)

Netherlands – criminal (*see* Sr art. 51, Stb. 1991, p. 100 (Neth.)) and civil (Nicola Jägers, *Survey Response, Laws of the Netherlands* 18-20, *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions*, FAFO, 2006)

Denmark – "Criminal liability for corporations has been around in Denmark for over 70 years." Michael J. Kelly, *Prosecuting Corporations for Genocide under International Law* 59 (Creighton Univ. Sch. of Law, 2011) (It is likely that if the occasion were to arise in Denmark, corporate liability also would extend to Rome Statute crimes.)

Norway – criminal and civil (Ingrid Hillblom, *Survey Response, Laws of Norway* 13-21, *Business and International Crimes*, FAFO, 2004)

Canada – criminal and civil (*Survey Response, Laws of Canada* 5, *Business and International Crimes*, FAFO, 2004; *see* Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.))

Kenya – criminal (*see* The International Crimes Act, No. 16 (2008), THE LAWS OF KENYA, REVISED EDITION § 2(1))

Estonia – criminal (*see* Criminal Code [PEN. C.] §§ 92, 93, RT I 2002, 86, 504 (Est.))

Latvia – criminal (*see* Criminal Law [PEN. C.] §§ 70.1, 71 (Lat.))

Fiji – criminal (*see* Crimes Decree, No. 44/2009 [PEN. C.] § 51, 10 G.G. 1021, 1065 (Fiji))

Malta – criminal (*see* Criminal Code [PEN. C.] cap. 9, arts. 121D, 248E (Malta), *available at* http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574&l=1)

In addition, although Rwanda has not ratified the Rome Statute, that country is within the territorial jurisdiction of the International Criminal Tribunal for Rwanda and has chosen, in the aftermath of the genocide of 1994, to enforce corporate liability for atrocity crimes. *See* Repressing the Crime of Genocide, Crimes against Humanity, and War Crimes, No. 33 (2003), arts. 4, 7 (Rwanda).

There is considerable variance in the law and practice of each of these national legal systems, but the basic principle of corporate liability (certainly civil and, in some instances, criminal) for Rome Statute crimes has been implemented at the national level.

Nations have also provided for extraterritorial enforcement of Rome Statute crimes with respect to natural persons and, in some instances recited below, juridical persons, with criminal penalties (often joined with civil penalties) resulting. These nations include:

Australia – both juridical and natural persons (*see Criminal Code Act, 1995* (Cth) pt 2.7, div 15.4 (Austl.); *Id.* at div 268.117; *Id.* at pt 2.5, div 12.1; *Id.* at div 268.3; *Id.* at dictionary)

United Kingdom – both juridical and natural persons (*see* International Criminal Court Act, 2001, c. 17, §§ 51(2)(b), 52(4)(b), 58(2)(b), 59(4)(b), 67(2) (Eng.))

Netherlands – both juridical and natural persons (Nicola Jägers, *Survey Response, Laws of the Netherlands* 20-22, *Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions*, FAFO, 2006; *see* Stb. 2003, p. 270 (Neth.); International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations* 19-20 (2010), *available at* http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23050)

Japan – natural persons (Multinational Report, Law Library of Congress, Crimes Against Humanity Statutes and Criminal Code Provisions, 13 (Apr. 2010), http://www.loc.gov/law/help/crimes-humanity_MULTI_RPT_final.pdf; 刑法 [Keihō] [PEN. C.] arts. 3-1, 3-2 (Japan))

Bosnia and Herzegovina – both juridical and natural persons (Criminal Code of Bosnia and Herzegovina [PEN. C.] arts. 12(2), 12(4), 12(5), 123, O.G. 3/03, 32/03, 37/03)

New Zealand – natural persons (International Crimes and International Criminal Court Act 2000, § 8(1)(c) (N.Z.))

Philippines – natural persons (An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes, Rep. Act. 9851, § 17 (2009) (Phil.))

Ireland – natural persons (International Criminal Court Act 2006 (Act No. 30/2006) (Ir.), *available at* http://www.irishstatutebook.ie/2008/acts.html)

Canada – natural persons (Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.))

Cyprus – natural persons (Law Amending the Rome Statute for the Establishment of the International Criminal Court (Ratification) Law of 2002, No. 23(III)/2006 (Cyprus))

Fiji – both juridical and natural persons (*see* Crimes Decree, No. 44/2009 [PEN. C.] §§ 4, 99, 10 G.G. 1021, 1065 (Fiji))

Kenya – natural persons (The International Crimes Act, No. 16 (2008), THE LAWS OF KENYA, REVISED EDITION §§ 6, 8)

Malta – natural persons (Criminal Code [PEN. C.] cap. 9, arts. 5, 54G (Malta), *available at* http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574&l=1)

Estonia – natural persons (Criminal Code [PEN. C.] §§ 7, 8, RT I 2002, 86, 504 (Est.))

Iceland – natural persons (General Penal Code, No. 19/1940 [PEN. C.] art. 6(9) (Ice.), *available at* http://eng.innanrikisraduneyti.is/laws-and-regulations/english/penal-code-and-punishment/nr/1145)

Georgia – natural persons (Criminal Code [PEN. C.] art. 5(2), (3) (Geor.))

Latvia – natural persons (Criminal Law [PEN. C.] § 4 (Lat.))

Mauritius – natural persons (International Criminal Court Act, No. 27/2011, §4 (3) p. 436, 440 (Mauritius), *available at* http://www.gov.mu/portal/goc/webattorney/file/international%20criminal%20court%20bill.pdf)

Bulgaria – natural persons (Criminal Code [PEN. C.] art. 6(1) (Bulg.), *available at* http://www.vks.bg/english/vksen_p04_04.htm)

Albania – natural persons (Criminal Code of the Republic of Albania [PEN. C.] arts. 6, 7, *available at* http://www.hidaa.gov.al/english/laws/penal%20code.pdf)

Although they are not ratifying states of the Rome Statute, Ethiopia,[7] Armenia,[8] and Azerbaijan[9]

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[7] Criminal Code of the Federal Democratic Republic of Ethiopia, No. 414/2004 [PEN. C.] arts. 17(1)(a), 269.

[8] Criminal Code of the Republic of Armenia [PEN. C.] art. 15(2), (3), *available at* http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng.

[9] Criminal Code of the Azerbaijan Republic [PEN. C.] art. 12.3.

have enacted national laws establishing, with varied reach, extraterritorial enforcement of atrocity crimes.

With respect to the Netherlands, on March 27, 2012, a Dutch court held 12 Libyan officials civilly liable for $1.33 million in damages for the torture and inhumane treatment of a Palestinian doctor in a Libyan prison. There was no nexus between the Netherlands and Libya or the Palestinian doctor in this case. The Dutch court awarded the damages on principles of universal civil jurisdiction. Rb. Gravenhage [Court of First Instance of the Hague] 21 maart 2012, m. nt. VanderHelm (El-Hojouj/Derbal) (Neth.), http://www.rechtspraak.nl.

Interestingly, the United States in recent years has enacted criminal laws that provide for extraterritorial enforcement of certain atrocity crimes against natural persons, partly to ensure that the United States is not a sanctuary for such perpetrators. While these recent laws do not target corporate conduct, they provide for criminal sanctions and deportation orders and thus avoid the issue of civil claims as provided for under the ATS. Nonetheless, they place the United States among the growing number of nations that provide for liability for extraterritorial crimes, many of which fall within the *Sosa* scope of crimes for the ATS.

These recent U.S. laws are the Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, § 1472, 123 Stat. 3480 (2009), the Child Soldiers Accountability Act of 2008, 18 U.S.C. §§ 2442, 3300 (2008), and

the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223, 122 Stat. 5044 (2008). Each law follows near-universal jurisdiction: any alien or U.S. citizen who commits the relevant crime (genocide, recruitment or use of child soldiers, or engagement in human trafficking) anywhere inside or outside the United States can be prosecuted on criminal charges in federal courts provided, in the case of a crime committed outside the United States, that alien has entered U.S. territory or the suspect is a U.S. citizen. *See* David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 Nw. J. Hum. Rts. 30, 33-35 (2009). The Torture Act, 18 U.S.C. §§ 2340, 2340A, is of similar character and Chuckie Taylor was convicted for torture and imprisoned under that law in *United States v. Belfast*, 611 F.3d 783, 793 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1511 (U.S. 2011).

That the alien may have a single or minimal contact with U.S. territory under these laws and in corporate liability cases under the ATS for two decades is similar to the nexus found in this case. Royal Dutch Petroleum has an active investor relations office in New York as an institutional part of its wholly-owned U.S. subsidiary. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93-98 (2d Cir. 2000). As Petitioners' counsel, Mr. Paul Hoffman, described in oral argument, "we have plaintiffs who are U.S. residents and were U.S. residents when they filed this case. They found a tortfeasor within the United States that they believe was responsible for these torts." Oral Arg. Tr. 8.5-9. Considerations of nexus, as

well as the question of universal concern, are the safety valves for corporate ATS cases. *See* Oral Arg. Tr. 12:16-14:17. Further, depending on the factual nexus to the U.S. and involvement of matters of "universal concern," certain existing doctrines may be applied, such as foreign sovereign immunity, political question, and the act of state doctrines. *See Sosa*, 542 U.S. at 732 n.21. These doctrines ensure that the floodgates are not wide open to ATS claims in federal court.

Thus, while there is variance in how nations have established extraterritorial jurisdiction for individuals and, in some instances, corporate conduct, the principle of extraterritorial jurisdiction has been established or fortified during the ratification and implementation process of the Rome Statute at the national level and, in several instances including the United States, by states that have not ratified the Rome Statute.

In their *amici* brief the governments of the United Kingdom and the Netherlands argued against the extraterritorial application of the ATS, *see* Br. of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Supp. of the Resp'ts 8-10, 29-31, Feb. 3, 2012, and during the oral argument their brief was referenced. Oral Arg. Tr. 34:9-15, 41:18-42:1. However, as evidenced by the countries listed above, many, either through their implementation process or existing national laws, have provided for extraterritorial enforcement of Rome Statute

crimes against natural persons and, in the case of the Netherlands and the United Kingdom, corporations as well. So on their own turf the Netherlands and the United Kingdom have demonstrated a different policy than that seemingly advocated in their *amici* brief.

Further, in theory, the Brussels I Regulation provides jurisdiction in European Union countries over corporations for civil damages for atrocity crimes, including Rome Statute crimes, and other crimes and torts, committed outside the jurisdiction where the claim is lodged but within the European Union, with victims and potentially perpetrators who can be aliens to the European Union (nationals of non-European Union states). I examined this in a co-authored law review article published in 2011:

> There is no direct counterpart of the ATS in Europe. However, there is something that potentially comes close: The 1968 Brussels Convention (now Brussels I Regulation) confers on the courts of the European Union (EU) Member States the competence to adjudicate civil proceedings against corporations domiciled in the EU even if the damage is sustained in third countries and even if the victim is not domiciled in the EU. The Brussels I Regulation is merely a jurisdictional prescription and does not *per se* determine the law applicable in the respective national jurisdiction. Rather, the conflict of law principle of *lex loci delicti* applies, determining that the law of the jurisdiction is applicable where the harm took place, namely, the forum

> state where the parent company, alleged to have committed the violations, is domiciled. The underlying rationale is that although the damage occurred abroad, the violation of duty was effected in the forum state.
>
> Some European jurisdictions have now implemented international crimes (in particular atrocity crimes) into national legislations and statutes and thus provided the substantive legal grounds for such claims under the Brussels I Regulation.

Scheffer & Kaeb, *supra* note 5, at 369-70 (footnotes omitted).

In other words, the connecting factor for tort liability before courts of EU member states under the Brussels I Regulation is either (1) the domicile of the corporation in question (and according to Article 60 of the Brussels I Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat, its central administration, or its principal place of business), or, in the alternative to domicile, (2) a sufficient link can be established to the forum where the damage occurred or the jurisdiction where the event giving rise to the damage occurred. The European Court of Justice has held that the place of the event giving rise to the damage, as well as the place where the damage occurred, could constitute a sufficient connecting factor in terms of the jurisdictional prescription of "the place where the harmful event occurred or may occur." Council Regulation 44/2001,

Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 5(3), 2001 O.J. (L 12) 1, 4; Case C-523/10, *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH*, ¶¶ 19-20, http://curia.europa.eu (search "523/10," then follow list of documents hyperlink, then click on April 19, 2012) (April 19, 2012).

Thus, the participation of a European-domiciled corporation in the commission of atrocity crimes, including against nationals of non-European Union states, can give rise to corporate civil liability in any European Union Member State jurisdiction where that corporation, though not domiciled there, engages in the criminal conduct.[10]

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[10] For the Brussels I Regulation to apply at all, the corporation needs to be domiciled in at least one of the 27 Member States of the European Union; otherwise, national law applies for jurisdictional questions regarding tort liability. Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Preamble, 2001 O.J. (L 12) 1, 2. However, some jurisdictions mirror Art. 5(3) of the Brussels I Regulation in their domestic laws, which establish jurisdiction over corporate defendants that are not domiciled within the EU. One example is Art. 96(2) of the Belgian Code on Private International Law. Law of 16 July 2004 Holding the Code of Private International Law art. 96(2) (Belg.), *available at* http://ipr.be/data/B.WbIPR%5bEN%5d.pdf. Thus, based on domestic law, domicile within the EU is not necessary in all EU jurisdictions and jurisdiction over tort cases can be extended to non-national perpetrators of the European Union.

III. Liability for Aiding and Abetting, Including the Applicable Mens Rea Standard, is Distinct from Whether Corporations can be Tortfeasors under the ATS, and is Answered by Customary International Law

When Justices Scalia and Ginsburg asked counsel for Respondents and for Petitioners, respectively, during oral argument two different but related questions about aiding and abetting liability, they were exploring one of the most fundamental elements of corporate liability under the ATS. *See* Oral Arg. Tr. 56:18-21, 43:1-9. The aiding and abetting issue is not before the Court in this case, which explains why Petitioners and *amici*, including myself, did not brief it earlier for the Court. But since it was raised during oral argument, its relationship to the central issues of this case – corporate liability under the ATS and the extraterritorial reach of the ATS – merits review here.

A. Liability for aiding and abetting, addressed by customary international law, is separate from the question of whether corporations can be liable under the ATS, which is answered by federal common law

When Justice Scalia asked Mr. Hoffman during oral argument whether aiding and abetting is a matter of domestic or international law, *see* Oral Arg. Tr. 56:18-21, Petitioners' counsel correctly responded that aiding and abetting is "a conduct regulating

norm, that it actually applies to the things that can be done to violate the norm. And, therefore, international law would apply to that." Oral Arg. Tr. 57:4-7. Courts look to international law to determine liability for aiding and abetting – whether the actus reus and mens rea requirements are met – because aiding and abetting is a mode of participation and, as such, is directly tied to the substantive tort, or crime, being adjudicated. In contrast, corporate liability under the ATS exists as a remedy, and therefore federal common law applies to the question of corporate liability. *See* Br. for Pet'rs 24-27, Dec. 14, 2011; *Exxon*, 654 F.3d at 50-51, 57.

Justice Ginsburg pointed out that *Sosa* dealt with conduct that falls under the ATS, namely the violations of the law of nations and treaties, and not who is subject to ATS jurisdiction. Oral Arg. Tr. 43:1-9. Ms. Sullivan disagreed with Justice Ginsburg by inferring that because everyone – the circuits and the parties – looks to customary international law for the mens rea standard for aiding and abetting, then surely they are obligated to look and find within customary international law a rule that identifies the tortfeasor – corporations – and embodies corporate liability for violations of the law of nations and treaties. *See* Oral Arg. Tr. 43:10-18. That is a very misleading argument, one premised on Respondents' interpretation of footnote 20 of *Sosa*. *See* Br. for Resp'ts 17-26. However, the determination of aiding and abetting liability has nothing to do with the

fundamental issue of whether the ATS permits corporate liability.

B. The Rome Statute is not necessarily representative of customary international law on the mens rea standard for aiding and abetting

Petitioners and Respondents disagree, as do the federal circuits, on the mens rea standard under international law. Respondents believe that the mens rea standard is intent, whereas Petitioners, supported by ample evidence, assert that it is knowledge. If the Court were to confirm corporate liability under the ATS, Respondents' view of aiding and abetting liability would minimize the exposure of corporations to claims under that statute, whereas Petitioners would maintain the scope of corporate liability at an appropriately broad level.

Among the federal Circuit Courts, several read federal law as well as customary international law as requiring the knowledge standard for ATS cases. *See Exxon*, 654 F.3d at 39; *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158-59 (11th Cir. 2005); *Bowoto v. Chevron Corp.*, No. C99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at *17-19 (N.D. Cal. Aug. 21, 2006); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004).

Respondents, joined by the appeals courts of the Second and Fourth Circuits, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d

Cir. 2009); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 158 (2d Cir. 2010) (Leval, J., concurring only in the judgment) (hereinafter "*Kiobel*"); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399-401 (4th Cir. 2011), believe that the mens rea standard for aiding and abetting under international law is intent. They look to the Rome Statute for authority to support the intent standard. As I have argued previously, this interpretation of the Rome Statute is erroneous. *See* Brief of David J. Scheffer, Dir. of the Ctr. for Int'l Human Rights, as *Amicus Curiae* in Support of the Issuance of a Writ of Certiorari at 15-17, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 131 S. Ct. 79 (2010) (No. 09-1262); Brief of David J. Scheffer as *Amicus Curiae* in Support of Appellants and Reversal at 13-15, *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (No. 10-56739); Scheffer & Kaeb, *supra* note 5, at 344-57. It overlooks the intent of the negotiators, the facts of the negotiations, the reality of how aiding and abetting unfolds with respect to atrocity crimes, and the very careful wording of both Articles 25(3)(c) and 30 of the Rome Statute. *Id.*

More troubling than erroneous statutory interpretation is Respondents' belief that the rule of customary international law is manifestly mirrored in the Rome Statute. *See* Oral Arg. Tr. 42:3-11; Br. for Resp'ts 49-51. The Second Circuit rightly points out that some treaties are "law-making" and others are not. *Kiobel*, 621 F.3d at 138-39. Relying on Second Circuit ATS precedent, that court noted:

> Although all treaties ratified by more than one State provide *some* evidence of the custom and practice of nations, "a treaty will only constitute *sufficient proof* of a norm of *customary international law* if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles."

Id. at 137 (quotations and citations omitted).

The Rome Statute is not a law-making treaty. The United States and more than 70 other nations have not ratified the Rome Statute. An intent standard for aiding and abetting liability is by no means embraced "uniformly and consistently." While the Rome Statute was intended to embody principles of customary international law in some of its provisions, particularly those relating to crimes within the subject matter jurisdiction of the Court, *see* Scheffer & Kaeb, *supra* note 5, at 349-50, the negotiations never pretended to address aiding and abetting liability for purposes of the Rome Statute as a principle of customary international law.[11] Rather, the articles of the Rome Statute relevant to aiding and abetting liability were heavily negotiated, with

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[11] It remains supremely ironic that such heavy reliance is placed on the Rome Statute by Respondents as evidence of customary international law when there has been such a long history of opposition by conservative elements in the United States to the treaty and to the International Criminal Court.

compromise language adopted to achieve acceptable results.

In fact, some of the statute's language was left purposefully vague, the so-called "constructive ambiguity" of the Rome Statute, which allowed negotiations to end without having to arrive at a conclusion one way or the other on some contentious points of negotiation. Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 604-06 (2003). Until the International Criminal Court definitively rules on the mens rea standard for aiding and abetting in a trial on the merits, it is pure speculation on the part of Respondents what that standard is under the Rome Statute. And even when the International Criminal Court does rule on this point, the Rome Statute still will not necessarily reflect customary international law on corporate or aiding and abetting liability.

C. The mens rea standard for aiding and abetting under customary international law, consistently recognized and applied by the war crimes tribunals, is knowledge

The mens rea standard for aiding and abetting under international law is found not in the Rome Statute but in the rulings of the war crimes tribunals, which enforce customary international law. The latter is a requirement confirmed in their constitutional

origins and consistently and explicitly applied in their judgments for almost two decades.

As the lead U.S. negotiator for the war crimes tribunals, I worked under the daily assumption that customary international law dictated the agenda. In contrast, the negotiations for the Rome Statute of the International Criminal Court were conducted as a complex mixture of customary legal principles and heavily negotiated compromises unique to the Rome Statute. Aiding and abetting liability fell into the latter category.

Customary international law applies the knowledge standard for aiding and abetting as a mode of participation. This standard has been confirmed repeatedly by the war crimes tribunals. Indeed, within recent months, the knowledge standard has been upheld by the Trial Chamber of the Special Court for Sierra Leone in its judgment against former Liberian President Charles Taylor, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgement, ¶¶ 486-87 (May 18, 2012), and by the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (the "Cambodia Tribunal") in its final judgment, affirmed by the Supreme Court Chamber (Appeals Chamber), against Kaing Guek Eav (*alias* Duch), the former warden of Tuol Sleng Prison in Phnom Penh during the Pol Pot regime. Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 535 (Extraordinary Chambers in the Courts of Cambodia July 26, 2010), *aff'd*, 001/18-07-2007-ECCC/SC (Feb. 3, 2012).

Charles Taylor was convicted on April 26, 2012, and sentenced on May 30, 2012, to 50 years imprisonment on aiding and abetting liability based upon the knowledge standard, as decided by international judges applying customary international law. In the *Taylor* judgment, the Special Court for Sierra Leone wrote:

> 486. The mental elements of aiding and abetting require that:
>
> i. The Accused performed an act with the knowledge that such act would assist the commission of a crime or underlying offence, or that he was aware of the substantial likelihood that his acts would assist the commission of underlying offence; and
>
> ii. The Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.
>
> 487. Although the lending of practical assistance, encouragement, or moral support must itself be intentional, the intent to commit the crime or underlying offence is not required. Instead, the Accused must have knowledge that his acts or omissions assist the perpetrator in the commission of the crime or underlying offence. Such knowledge may be inferred from the circumstances. The Accused must be aware, at a minimum, of the essential elements of the substantive crime or underlying offence for which he is charged with responsibility as an aider and

> abettor. The requirement that the aider and abettor need merely know of the perpetrator's intent – and need not share it – applies equally to specific-intent crimes or underlying offences such as persecution as a crime against humanity.

Taylor, Case No. SCSL-03-01-T at ¶¶ 486-87 (footnotes omitted). At no point did the judges in *Taylor* look to the Rome Statute for guidance about how to determine the mens rea standard for aiding and abetting, and at no point were they confused by the intent to lend "practical assistance, encouragement, or moral support" versus the "intent to commit the crime or underlying offence." *Id.*

Similarly, the Cambodia Tribunal, an internationalized Cambodian court consisting of Cambodian judges and international judges selected by the U.N. Secretary-General, recently affirmed the knowledge standard. The Cambodia Tribunal ruled in the *Duch* Judgment that "[l]iability for aiding and abetting a crime requires proof that the accused knew that a crime would probably be committed, that the crime was in fact committed, and that the accused was aware that his conduct assisted the commission of that crime." Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 535 (Extraordinary Chambers in the Courts of Cambodia July 26, 2010) (footnotes omitted), *aff'd*, 001/18-07-2007-ECCC/SC (Feb. 3, 2012).

The authorities relied on by both the Special Court for Sierra Leone and the Cambodia Tribunal were drawn from the ad hoc tribunals, which applied customary international law in using the knowledge

standard in aiding and abetting cases. In its conviction of Duch on aiding and abetting charges, the Cambodia Tribunal also relied heavily on earlier rulings of the Special Court for Sierra Leone confirming the knowledge standard. *Id.* at ¶ 535 nn.936-37.

Even a Pre-Trial Chamber of the International Criminal Court itself recently acknowledged, in a ruling to deny charges against a particular suspect, that the ad hoc tribunals use the knowledge standard for aiding and abetting. *See Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 274, 274 n.653 (Dec. 16, 2011). The Pre-Trial Chamber made no attempt whatsoever to hold that its understanding, delivered as dicta in the matter, of the aiding and abetting standard in the Rome Statute reflects customary international law. Rather, it repeatedly emphasized the ad hoc tribunals' interpretation of the standard as one of knowledge rather than intent. *Id.* at ¶ 274, 274 n.653, 281.

The fundamental flaw in Respondents' argument is its reliance on the Rome Statute. Respondents seek to eliminate or at least severely restrict corporate liability under the ATS by invoking the Rome Statute as the source for customary international law. On both counts – corporate liability *per se* and the standard for aiding and abetting – the legal foundations are found elsewhere. For corporate liability, one should draw from federal common law, the general principle of corporate civil liability for egregious torts, and the growing acceptance of extraterritorial liability by national legal systems. For the mens rea standard for

aiding and abetting, the knowledge standard is discovered in the jurisprudence of the District of Columbia, the Ninth, and the Eleventh Circuits, *see supra* p. 29, and in the customary international law rulings of the war crimes tribunals over the last two decades.

IV. The Court Should Uphold Corporate Liability and Extraterritorial Jurisdiction under the ATS Because Such Liability is in Line with Past and Present American and International Policy Goals

The Alien Tort Statute in 1789 created a uniquely American approach to violations of treaties and the law of nations for the benefit of aliens in federal courts. The *Sosa* judgment clarified the scope of the substantive torts that can be litigated based upon the Court's interpretation of customary international law as it prevailed in 1789. According to the Court "the door is still ajar" under the ATS for additional torts that meet the requirements of customary international law. *Sosa*, 542 U.S. at 729.

As demonstrated in Part II above, many nations in recent years have moved in two bold directions that together strengthen their commitment to the rule of law and the proposition that no man, woman, or corporation stands above the law – a pledge that honors our Founders and is echoed in one of their earliest laws, the ATS. The first pathway is the one taken by 121 foreign nations to ratify the Rome Statute. Such ratifications have created a new and growing regime of individual criminal liability for the

commission of atrocity crimes. It is a regime that the United States has not joined, but one with which Washington is increasingly cooperating in order to achieve accountability for grievous assaults on humankind.[12] Given its permanent membership in the U.N. Security Council, the United States has joined in facilitating the jurisdiction of the International Criminal Court over such atrocity situations as Darfur and Libya[13] with referrals under Chapter VII of the U.N. Charter and in a manner consistent with

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[12] Stephen J. Rapp, the Ambassador-at-Large for Global Criminal Justice, described the U.S.'s recent efforts to cooperate with the ICC: "Over the past several years, we have sent active observer delegations to the ASP sessions and the Review Conference in Kampala. We have actively engaged with the OTP and the Registrar to consider specific ways that we can support specific prosecutions already underway, and we have responded positively to a number of informal requests for assistance." Stephen J. Rapp, Ambassador, U.S. Statement to the Assembly of States Parties of the International Criminal Court (Dec. 14, 2011), *available at* http://www.state.gov/j/gcj/us_releases/remarks/179208.htm. Furthermore, Ambassador Rapp has recently advocated for an expansion of the US War Crimes Rewards for Justice Program, which would include ICC indictees. *See The State Department's Rewards Programs: Performance and Potential: Hearing Before the Subcomm. on Terrorism, Nonproliferation, and Trade of the H. Comm. on Foreign Affairs,* 112th Cong. 3-5 (2012) (statement of Stephen J. Rapp, Global Criminal Justice).

[13] Ambassador Susan E. Rice, describing the U.S.'s role with Resolution 1970, stated "[w]e are pleased to have supported this entire resolution and all of its measures, including the referral to the ICC. We are happy to have the opportunity to co-sponsor this." Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at the Security Council Stakeout, on Resolution 1970, Libya Sanctions (Feb. 26, 2011), *available at* http://usun.state.gov/briefing/statements/2011/157195.htm.

Article 13(b) of the Rome Statute. S.C. Res. 1593, U.N. Doc. S/RES/1593 (2005); S.C. Res. 1970, U.N. Doc. S/RES/1970 (2011); U.N. Charter Chapter VII; Rome Statute of the International Court art. 13(b), July 17, 1998, 2187 U.N.T.S. 90.

The second phenomenon has been a parallel movement towards various regimes of corporate liability and extraterritorial jurisdiction for the commission of or complicity in atrocity crimes in an impressive number of the ratifying and non-ratifying states. While such developments have arisen within domestic legal systems, they have been inspired by the transformation of international criminal law during the last two decades with the creation of the war crimes tribunals and the International Criminal Court. *See generally*, David J. Scheffer, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS (2012). The trend lines point towards greater, not lesser, accountability for both natural persons and corporations.

The Court has an opportunity in this case to demonstrate that the United States and its laws continue to inspire the quest for justice that so many other nations have chosen to embrace in recent years despite, and tragically because of, continuing atrocities across the globe.

CONCLUSION

The Court should reverse the Second Circuit's ruling in this case and hold that the ATS provides for corporate liability, including extraterritorial application when circumstances warrant. The Rome Statute offers no basis for holding otherwise. If the Court decides to comment on the mens rea standard for aiding and abetting liability, it should confirm that which is found in both federal common law and customary international law – the knowledge standard.

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Respectfully submitted,

AMBASSADOR DAVID J. SCHEFFER
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
375 East Chicago Avenue
Chicago, Illinois 60611-3069
(312) 503-2224

Amicus Curiae